IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.06.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl. A. Nos.435, 493 & 582 of 2001

In Crl. A. No.435 of 2001:
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Mylerumperumal (A1) .. Appellant

Vs

The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.4, Gopalakrishna (Iyer) Road,
T.Nagar,
Chennai 17. .. Respondent

In Crl. A. No.493 of 2001:
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The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.4, Gopalakrishna (Iyer) Road,
T.Nagar,
Chennai 17. .. Appellant

Vs

1. V.Mayalerumerumal (A1)

2. M.Nallaiyappan (A2) .. Respondents

In Crl. A. No.482 of 2001:
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The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.4, Gopalakrishna (Iyer) Road,
T.Nagar,
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Chennai 17. .. Appellant

Vs

1. Vijay Singh (A3)

2. Jagtar Singh (A4) .. Respondents

Prayer:

These Appeals have been preferred against the judgment dated 17.5.2001 made in C.C.No.107 of 1999 on the file of the Additional Special Court, NDPS Act Cases, Chennai.

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Crl. A. No.435/2001:
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For Appellant : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.R.Dhanapal Raj, Spl. Public Prosecutor, for Customs cases
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Crl. A. No.493 of 2001:
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For Appellant : Mr.R.Dhanapal Raj, Special Public Prosecutor, for Customs cases

For Respondents : Mr.V.R.Shanmuganathan for R1
Mr.Lakshmipriya for R2
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Crl. A. No.582 of 2001:
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For Appellant : Mr.R.Dhanapal Raj, Special Public Prosecutor, for Customs cases,

For Respondents : Mr.R.C.Paul Kanagaraj
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COMMON JUDGMENT
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Crl.A.No.435 of 2001 has been preferred against the judgment in C.C.No.107 of 1999 on the file of the Additional Special Court for NDPS Act cases, Chennai, by A1.

2.Crl.A.No.493 of 2001 has been preferred by the State against the acquittal of A1 and A2 against the charge under Section 29 of the NDPS Act, in C.C.No.107 of 1999.

3.Crl.A.No.582 of 2001 has been preferred by the State against the acquittal of A3 & A4 against the charges under Section 8(c) r/w 21, 25 & 29 of the NDPS Act, in C.C.No.107 of 1999.

4.The short facts of the prosecution case relevant for the purpose of deciding these appeal sans irrelevant particulars are as follows:

In pursuance of the conspiracy hatched between A1 to A4, A3 had transported heroin, a narcotic drug from Mandsaur to Chennai through A4's lorry bearing registration No.DL-1G-2662 and handed over to A1 & A2 on receipt of Rs.60,000/- by A4. On intelligence, a search was conducted in the house of A1 at AP/H-6, 12th Street, Anna Nagar West Extension, Chennai-600 101 and 30 polythene bags kept in two suitcases were seized from the room in the first floor of the residence of A1. On the basis of the information given by A1 another search was conducted in the Maruti omni van bearing registration No.TSA-5014, which was parked in front of the house of the mother of A2 and 5 kgs of heroin was seized in 12 polythene packets and kept concealed in the sliding door panel of the said Maruti omni van. According to the prosecution, the said narcotic drugs were procured on the finance sent from Colombo to Chennai by one Hafeel of Colombo through Hundi transactions between A1 and A2 during the period October-1998 and January-1999. In pursuance of the intelligence, 2.560 kgs of narcotic drug was seized on 24.3.1999 from a room at door No.32, Kachaleeswarar Agraharam of Armenian street, Chennai, which is under occupation of A2. When the samples drawn from the seized contraband were sent to the chemical laboratory at Customs House, the test answered for the presence of heroin. Hence, the accused have been charged under Section 8(c) r/w 21, 25 & 29 of the NDPS act.

5.The learned trial judge after taking cognizance of the offence, had issued summons to the accused and on their appearance copies under section 207 Cr.P.C., were furnished to the accused and the charges were framed against the accused under Section 8(c) r/w 21, 25, & 29 of the NDPS Act. Before the trial Court P.W.1 to P.W.20 were examined and Ex.P.1 to Ex.P.95 were exhibited and M.O.1 to M.O.22 were marked.

6.P.W.1 is an Intelligence Officer in the Directorate of Investigation Department, Government of India. He has been empowered to conduct search and also seize the contrabands as per the provisions of NDPS Act and also to record the statements. On 23.3.1999 as per the intelligence received to the effect that a lorry loaded with heroin was being transported and that it is going to be placed in the house at door No.12 of Anna Nagar, West Extention, belonging to A1-Myleruperumal and or to be placed in door No.32, Kachaleeswarar Agraharam, the house belonging to A2-Nellaiyappan, after reducing the same into writing, he placed the same before his superior senior intelligence officer Mr.K.P.H.Paul Mohamed. Ex.P.1 is his report.

7.P.W.2 is the Superintendent in Central Excise Department. According to him, at the relevant period, he was working in the Central Directorate of Intelligence as an intelligence officer and that he has been empowered to take action under Section 41, 42, 43 & 67 of the NDPS Act. In pursuance of Ex.P.1-report submitted by P.W.1 to Mr.K.P.H.Paul Mohamed (P.W.19), a teem was formed under the leadership of Mr.Hubarti (P.W.17) a search warrant was prepared in order to conduct a search in door No.AP/H-6, 12th street, Anna Nagar West Extension, Chennai and the team proceeded to the said house along with two witnesses viz. Kannan and Venkatesan (P.W.6) and that he along with the

witness and the team officer went to the said house at about 12.00 noon on 23.3.1999 and at that time A1 was in his house and he conducted an enquiry. Even though A1 was evasive in his reply initially, later he had admitted that he is in possession of narcotic drugs and accordingly produced two suitcases from the shelf in the bed room. When the black coloured suitcase was opened there found 6 polythene packets, in which all the polythene packets contained two small packets. All the small packets were marked as S1 to S12. In the other suitcase 14 packets were found, each packet was containing two small packets. The small packets were marked as S13 to S39. When those packets were opened he could find brown coloured powder in it. When sample powders were taken from each of the packets and tested with the aid of the test kit it answered for the presence of 'heroin'. Two samples each weighing 5 grams were taken from each of the packets and marked as S1 to S39 original and S1 to S39 duplicates. The total weight of the contraband was 20 kgs. The seized contrabands were separately packed and sampled packets were also separately packed and sealed. Ex.P.2-seizure mahazar was prepared for the seizure of the above said material objects and DRI seal was affixed on each of the material objects seized. Both the independent witnesses viz. Kannan and Venkatesan (P.W.6) have also signed along with him. The accused also admitted that the contraband seized was heroin and that he also signed in Ex.P.2-mahazar. Ex.P.3 is the packet telephone diary belonging to A1. M.O.4 (series) are the slips containing the telephone No.6288752. Ex.P.5 is the telephone indicator number particulars relating to one Kandasamy. Ex.P.6 is the Fax letter dated 4.3.1999 in the name of one Subsala firm. Ex.P.7 is the another Fax letter dated 18.3.1999 issued by one Kavin Groups. Ex.P.80 another Fax letter dated 14.3.1999 issued by Subsala firm. M.O.1 black colour suitcase. M.O.2 is the gray colour suitcase. The contrabands seized from M.O.1-suitcase was marked as L1 to L12 (M.O.3-series, 12 in number). The contrabands seized from M.O.2-suitcase was marked as L13 to L39 (M.O.4-series, 27 in number). M.O.5 are the samples taken from M.O.3-series, which were not sent for chemical analysis. M.O.6-series are the samples taken from packets marked as L13 to L39, which were not sent for chemical analysis. A copy of the mahazar was furnished to the accused In M.O.3 to M.O.6 packets both the witnesses and A1 have signed.

8.P.W.3 is an intelligence officer working in Central Revenue Investigation Department. On 23.3.1999 at about 4.00 pm as per the instructions of his higher intelligence officer K.P.N.Paul Mohamed, a search warrant-Ex.P.9 was prepared and a search was conducted at door No.32, Kachaleeswarar Agraharam, in the house of A2-Nellaiyappan at about 10.00 pm on the same day. He has secured independent witnesses viz. Murugesan and Senthilkumar and that the search was conducted at about 10.00 pm on the same day and during search they could recover one plastic bag and bottle containing some powder. The powder contained in plastic bag weighed 2.160 grams and the powder in the bottle weighed 400 grams. When samples taken from those seized contrabands were tested with the test kit they answered for the presence of heroin. Two samples were taken from the powder contained in the bag each weighing 5 grams and two samples from the powder contained in the bottle weighing each 5 grams were taken and both the samples as well as the remaining contraband were separately packed and sealed. The samples taken from the plastic bag was marked as S1 original and S1 duplicate and sample taken from the bottle were marked as S2 original and S2 duplicate. The remaining contents in the plastic bag were sealed and marked as L1 and the remaining powder in the bottle were sealed and marked as L2. The above said contrabands were seized under Ex.P.10-mahazar. Ex.P.11 is the diary belonging to Mr.Dipak Sunillalsha. Ex.P.12 is the identification card for Krishnadass, which was issued by Government of Srilanka. Ex.P.13 is the three small telephone diaries. Ex.P.14 is the small packet size diary. Ex.P.15 is the slip containing the telephone indicator numbers. Ex.P.16 (series) are the slips dated 26.12.1998 containing the telephone indicator numbers. Ex.P.18 are the visiting card relating to several companies. Ex.P.19 (series) are the postal and courier particulars. Ex.P.20 is the letter dated 20.3.1999 written by Billbride Company. Ex.P.21 is the letter dated 18.3.1999 written by Billbride company to Chief Minister. Ex.P.22 is the complaint dated 3.11.1998. Ex.P.23 is the letter written by one advocate viz. Pugazhenthi to Billbride company. Ex.P.24 (series) are the slips recovered under

mahazar. The above said documents were recovered from a box in the house of A2/Nellaiyappan. M.O.11 is the balance of the contraband after taking the sample from L1 polythene bag. M.O.12 is the balance of contraband after taking the sample from L2 polythene bottles. M.O.13 is the sealed cover containing the samples taken from M.O.11, not sent for chemical examination. M.O.14 is the sealed cover containing samples taken from M.O.12 and marked as S2, not sent for chemical analysis. M.O.15 is the returned cover from Chemical laboratory containing the balance of the sample for chemical examination taken from M.O.11. M.O.16 is the balance of sample after chemical analysis taken from M.O.12. The witnesses have signed in M.O.11 and M.O.14. A mahazar was prepared for the seizure of the above said contrabands in the presence of witnesses. On 24.3.1999 as per the directions of his higher official Mr.Paul Mohamed, he had conducted a search in the lorry bearing registration No.TS.1G.2662. Ex.P.26 is his special report. During the search of the lorry, A4-Jagtar Singh was present in the lorry, who had admitted for having transported the contrabands in the lorry, A3-Vijaya Singh had given Rs.60,000/- to him (A4). He has also handed over Rs.15,000/- being the hire charge received by him for transporting the coriander leaves from indore to Tirupathur and he has handed over Rs.13,000/- being the hire purchase instalment due for the lorry, besides handing over Rs.3,500/- kept with him. He has prepared Ex.P.26-mahazar in the presence of witnesses Jayaluthin and Saiyath Mobaraq. Ex.P.27 is the mahazar for the seizure of the document pertaining to the said lorry. M.O.17 (series) are the six bundles of currency notes to the value of Rs.60,000/- in 100 denomination each. M.O.18 is the polythene bag in which the above said Rs.60,000/- was found. He has prepared a special report under Ex.P.28 and submitted the same to Mr.Paul Mohamed P.w.19. On 1.4.1999 as per the orders of the Special Court, he took the samples connected in this case for chemical examination. Ex.P.29 is the letter of requisition issued by the Court. He had received back the unexpended portion of the sample along with the analyst's report from the laboratory and resubmitted to the Court.

9.P.W.4, as per the instructions from his higher official P.W.19, conducted a search at about 10.00 pm on 23.3.1999 at door No.32, Kachaleeswarar Agraharam on the basis of Ex.P.9-search warrant in the presence of two witnesses viz. Murugesan and Senthilkumar. At the time of search three persons were sleeping in the said house and door of the house was opened by one Senthil Arasan. Out of the three persons who were sleeping in the said house one was A2. He had informed that he is one of the partners of Billpride Incorporated Company. After showing Ex.P.9-search warrant, P.W.4 had conducted search in the said house and recovered a polythene bag and a plastic bottle containing powder packets. When the samples taken from the polythene bag were tested they answered for the presence of the heroin and the contraband found in ploythene bag weighed 2.16 kgs and the contraband found in the bottle weighed 400 grams. The polythene bag was marked as L1 and bottle was marked as L2. About 20 grams powder from the above said contents were taken as samples. The samples taken from L1-polythene bag were marked as L1 original and L1 duplicate and the samples taken from L2-bottle were marked as L2 original and L2 duplicate. The samples were separately packed and sealed with DRI seal. A2 was found in possession of a suitcase and from the said suitcase some of the bill and letters were also seized by him under Ex.P.10-mahazar. Ex.P.11 to Ex.P.24 are the documents recovered on the said date from the room of A2. The samples taken from the L1-polythene bag were marked as S1 original and S1 duplicate and samples taken from L2-bottle were marekd as S2 original and S2 duplicate. M.O.11 to M.O.16 are the samples taken from the seized contrabands. Copy of the mahazar was furnished to A2. P.W.19 has further instructed him (P.W.4) to conduct search in the van bearing registration No.TSA-504, which were parked at Anna Nagar house of A1. Accordingly, he (P.W.4) went to the house of A1 at Anna Nager, West Extension, along with two witnesses viz Said Mubaraq & Jalaluthin and conducted a search and during the search 8 packets were recovered from the back of the steering wheel of the van. Ex.P.30 is the mahazar prepared for the seizure of 12 packets from the said van. 7 packets were weighing each 500 grams and remaining 5 packets weighing each 300 grams. When small samples was taken from the seized contraband for test, it answered for the presence of heroin. 12 sample packets each weighing 5

grams were taken from 12 packets. They have been marked as PS1 to PS12 original and PS1 to PS12 duplicate. The seized contrabands were neatly packed and affixed with DRI seal. The remaining contrabands in 12 packets were also neatly packed and sealed. In all the above said 37 packets A1 and other two witnesses have signed. Under Ex.P.10-mahazar the seized articles along with Maruthi van with RC book were seized. A copy of the mahazar was furnished to the accused. Ex.P.57 is the special report submitted by him. M.O.19(series) are the 12 sample packets which are the balance of the samples not sent for chemical analysis. PS.1 to PS.12 sealed cover containing the sample heroin powder received after chemicl analysis. They are marked as PS.1 to PS.12 original (M.O.21 series). He has enquired A1. Ex.P.34 is the statement of A2, in which he and A2 have signed. A2 was arrested on 25.3.1999 and sent to remand. Ex.P.36 is the arrest report submitted by him.

10.P.W.5 had conducted a search at door No.12, New Street, Manadi, the house belonging to one Mohan at about 6.30 am on 24.3.1999, but nothing incriminating materials were seized from the said house.

11.P.W.6 is one of the witness in Ex.P.2-mahazar prepared for the seizure of material objects from the house of A1. He would admit that he has signed as a witness under Ex.P.49-search warrant. He has also identified M.O.1 to M.O.10 as the material objects seized from the house of A1.

12.P.W.7 is a witness in the mahazar Ex.P.30 for the recovery of the material objects from the van of A1. He is also a witness in Ex.P.26-mahazar for the seizure of Rs.60,000/- from A4.

13.P.W.8 is a car driver under A1. He has not supported the case of the prosecution. Hence he was treated as hostile witness.

14.P.W.9 is a witness in Ex.P.41-mahazar, prepared for the seizure Ex.P.42 to Ex.P.46. Ex.P.48 are the statement given by P.W.9.

15.P.W.10 would admit that Ex.P.52 is his statement. He would admit that Ex.P.53 is the carbon copy copy for the check in register of hotel Surath at broadway and A3 had stayed with him in room No.5 at 18.3.1999.

16.P.W.11 is an intelligence officer. He would depose that as per the instructions of P.W.19-Paul Mohamed a search was conducted in the maruthi omni van parked at AP/H-6, 12th Street, Anna Nagar West Extension, Cehnnai, the house of A1. M.O.22 is the said maruthi van. M.O.24 is the lorry bearing registration No.TL-1G-2662. Ex.P.52 is the statement of P.W.10-Jose, in which he has signed as a witness.

17.P.W.12 would depose that he knows Hindi and that he has enquired third accused and recorded his statement-Ex.P.35. Ex.P.36 is the rent receipt in favour of A3 for having stayed at Surath Hotel at Broadway. Ex.P.58 is the special report given by him to P.W.19. Ex.P.59 is the statement of A4, wherein he has signed as a witness. Ex.P.60 is the translation copy for Ex.P.59. Ex.P.61 is the statement of A3. Ex.P.62 is the translation copy for Ex.P.61. Ex.P.63 is the statement of A4. Ex.P.64 is the translation copy for Ex.P.63. He has arrested A3 under Ex.P.65-arrest memo. Ex.P.66 is arrest memo for A4.

18.P.W.13 had conducted a search, in room No.5 of Surath lodge on 24.3.1999 at about 5.00 am as per the directions of P.W.19-Mr.paul Mohamed. He took A3 from the lodge and produced before P.W.19. Ex.P.67 is the statement of Jagtar Singh, the brother of A4. Ex.P.68 is the translation copy for Ex.P.67, wherein he has signed as a witness. Ex.P.69 is the statement of Seshadri Sekar, wherein he has signed as a witness.

19.P.W.14 has not supported the case of the prosecution. Hence, he was treated as hostile witness.

20.P.W.15 would depose that as per the orders of the investigating officer in this case, he had examined one Ramanathan of Thanjavur, and also conducted a search in the house of one Rajendran of Uthamanur, Trichy District. Ex.P.71 is the mahazar. Ex.P.72 is the statement of Ramanathan.

21.P.W.16 is the chemical examiner in Central Revenue Control Department. According to her, on 1.4.1999, an intelligence officer-Sanjay Kumar had brought 53 packes along with a test memo-Ex.P.37 and requisition from the Court-Ex.P.26. The said 53 packets were acknowledged by Saraswathi, Chemical analysts working under her and that she had opened the said 53 packets and handed over to 5 chemical analyst for analysis. Ex.P.23 is the analyst's report. M.Os.8, 15, 16, 21 are balance of sample after analysis, returned to the Court.

22.P.W.17 had conducted a search in the house of A1 under Ex.P.49-search warrant in the presence of witnesses and other officials. He would say that in the search A1 had produced 2 suitcases from his bed room viz. M.O.1 & M.O.2 from where six polythene covers were seized from M.O.1 (each polythene cover contained two small packets) and 13 plastic packets (containing 2 small packets each) were seized from M.O.2-suitcase and that two samples were taken from each of the packets seized weighing 5 grams each, and that the samples as well as the seized contrabands were separately packed and sealed. Ex.P.2 is the mahazar prepared for the seizure of the contrabands from the house of A1. Ex.P.74 is the statement of A1's wife Komal Devi. He has also deposed about the search conducted in the Maruthi Van which was parked in front of the house of A1 and also about the seizure of 5 kgs of heroin from the said Maruthi van No.TSA.5014. Ex.P.75 is the special report submitted by him to Mr.Paul Mohamed. He has also submitted special report under Section 57 of NDPS Act. The said report is Ex.P.76. Ex.P.77 is the statement of A1 dated 24.3.1999, wherein he has also singed as a witness. Ex.P.78 is the statement of A1, in which also he has also signed as a witness. He has arrested A1 under Ex.P.79-arrest memo. Ex.P.81 is the statement of Mohamed Raffic. Ex.P.83 is the statement of one Prabakaran. Ex.P.85 is the statement of Sasidharan.

23.P.W.18 would depose that A4 is the driver of the lorry bearing registration No.LT-1G-2662. Ex.Ps.88 & 89 are the statement of P.W.18.

23.P.w.19 speaks about the intelligence received by him in this case. According to him, Ex.P.1 is the said intelligence report received by him from P.W.1 and on the basis of Ex.P.1 he had issued necessary instructions to his subordinate to conduct search in the house of A1 and A2 separately by intelligence officers, as per Section 41(2) of the NDPS Act. Ex.P.49 is the search warrant issued by him in respect of the search to be conducted in the house of A1. Ex.P.9 is the search warrant issued by him for the search to be conducted in the house of A2. He would further depose that on 24.3.1999 at about 3.30 am the intelligence officers have produced A2 with the contrabands seized from him and that he kept the seized articles with him under safe custody. Ex.P.25 is the special report submitted by Sai Kumar-P.W.3, an intelligence officer. P.W.17 has also conducted a search as per his instructions and produced A1 and other contrabands seized from A1's house along with samples and that he had received those seized articles and kept with him for safe custody. Ex.P.76 is the special report filed by P.W.17. Ex.P.58 is the special report filed by Iqbal another intelligence officer for having conducted search in the maruthi omini van belonging to A1. Ex.P.33 is the special report submitted by Sathish another intelligence officer for having conducted a search in the lorry bearing registration No.TL-1G-2662 and the material objects seized and produced by him was also kept in his safe custody. P.W.3-Saikumar, intelligence officer, has produced Rs.60,000/-, recovered from the A4, which was also received by him under acknowledgment and kept under safe custody. The accused along with the seized contrabands were produced beffore EO-II, Chennai, and all the seized contrabands and accused were produced before the Special Court for NDPS Act cases on 30.3.1999,

for judicial custody. He has examined the witnesses and recorded the statement. Ex.P.92 is the statement of A3. Ex.P.93 is the translation copy for the same. Ex.P.94 is the statement of A4. Ex.P.95 is the translation copy. After completeing the formalities, he had filed the complaint against the accused before the Special Court for NDPS Act cases.

24.When incriminating circumstances were put to the accused, they denied their complicity with the crime. The learned trial Judge, after going through the materials produced before him, had come to the conclusion that the charge levelled against A1 under Section 8(c) r/w 21 of NDPS Act has been proved beyond any reasonable doubt and accordingly convicted and sentenced A1 to undergo 10 years RI and a fine of Rs.1,00,000/- with default sentence and acquitted A2 to A4 holding that they are not guilty for the offence under Section 8(c) r/w 21, 25 & 29 of NDPS Act, has not been proved beyond any reasonable doubt. A1 was also acquitted from the charge under Section 29 of NDPS Act. Aggrieved by the findings of the learned trial judge, A1 has preferred Crl.A.No.435 of 2001 against the conviction. The State has preferred Crl.A.No.493 of 2001 against the acquittal of A1 & A2 under Section 29 of NDPS Act. The State has also preferred an appeal in Crl.A.No.582 of 2001 against the acquittal of A3 & A4 under Section 8(c) r/w 21, 25 & 29 of NDPS Act.

25.Now the point for determination in this appeal are as follows:

i) Whether the findings of the learned trial Judge in C.C.No.107 of 1999 against A1 for an offence under section 8(c) r/w 21 of NDPS Act is liable to be set aside for the reasons stated in the memorandum of appeal?

ii) Whether the findings of the learned trial Judge in C.C.No.107 of 1999 against A1 to A4 that A1 to A2 are not guilty for the offence under Section 29 of NDPS Act and A3 & A4 are not guilty for the offence under Section 8(1) r/w 21, 25 & 29 of NDPS Act is perverse in nature to warrant any interference from this Court?

26.The Points:

26(a) The learned counsel Mr.Paul Kanagaraj appearing for the appellant in Crl.A.No.435 of 2001 mainly focused the attention of this Court to the delay in sending the material objects seized from A1 by P.W.19 to the Court. The learned Counsel relying on 2005(1) Crimes 573 (Eze Val Okeke @ Val Ese Vs. Narcotic Control Bureau), would contend that the prosecution has failed to let in any evidence to show that the contrabands recovered from A1 by P.W.17 were produced by him to P.w.19, who in turn had produced the same along with the accused before E.O-II, Chennai, at the time of first remand, who after remanding the accused had returned the contrabands produced by P.w.19 to him with a direction to produce the contrabands before the Special Court on 30.3.1999. The same were returned to P.W.3 for producing the same before a Chemical Analyst for analysis after affixing the seal of the Special Court and that the contrabands were not produced by P.W.3 before the Analyst for Chemical analysis on the same day, but it was produced only on 1.4.1999. The learned counsel would represent that the analyst Saraswathi, who had actually received the contrabands seized in this case from A1 received the same for chemical analysis from P.W.3, was also not examined in this case to show that, at the time of handing over the samples taken from the seized contrabands, were produced before the analyst with seals intact. The learned counsel would contend that this laps on the part of the prosecution is fatal to the case of the prosecution. In support of this contention, the learned counsel relied on an observation of the Honoruable Apex Court in the above said dictum, which runs as follows:

"The prosecution was under a further duty to prove satisfactorily and beyond reasonable doubt that the article allegedly recovered from the appellant was properly sealed, preserved and thereafter

sent to CRCL for analysis and there was no tampering with the recovered article till the time it was taken up for chemical analysis. In this case, the prosecution has miserably failed to prove on record that the article allegedly recovered from the appellant was properly sealed, properly preserved and then sent to the CRCL for analysis in the same condition and none had tampered with it before it was examined by the Chemical Examiner. The first and foremost reason for holding so is that the seal with which the recovered article and samples were sealed at the spot was not handed over to any public witness after the sealing process was over and instead it was handed over to an official witness P.w.8 only. This was highly improper. There is no explanation as to why the seal was not handed over to a public witness when he was available to ensure that the recovered article was not tampered with during the period it remained with the Investigating Officer or with the authorized officer under Section 53 of the Act. Not only this, P.W.8-C.B.Singh, Superintendent, NCB to whom this seal was handed over after alleged recovery of the article in question stated that he handed back this seal to P.W.12-N.S.Ahlawat, Assistant Director on the same day. If the seized article as well as seal remained with P.W.12 only from the time of seizure till the time samples were sent to CRCL for analysis, there is no guarantee that the samples were not tampered with during that period. Furthermore, the prosecution was under an obligation to establish on record as to who had taken the samples of the contraband from P.W.12 and taken those to CRCL and also prove that he had not tampered with the samples during that period. The person, who had taken the samples to CRCL was not examined before the Court."

Only under such circumstances, it has been held by the Honourable Apex Court that the prosecution has not proved the guilt of the accused beyond any reasonable doubt and accordingly, allowed the appeal preferred by the accused.

But the facts of the above said case will not be applicable to the facts of the case on hand. In this case, P.W.16, an analyst, who is higher in cadre of Saraswathi, who had received the sample contrabands for analysis from P.W.3, has disposed in this case. According to her, the entire 53 samples of the contrabands connected with this case were received with requisition letter of the Court under Ex.P.29 with seal intact condition by Saraswathi only in her presence and that she only distributed the sample packets to Sarswathi and other analysts for analysis. In this case P.W.3, an intelligence officer, has received the samples from the Court and handed over the same to the chemical analyst, has been proved by the prosecution by examining P.W.3 and P.W.16.

26(b) Relying on 2005(1) Crimes 346 (SC) (State of Rajasthan Vs. Gurmail Singh), the learned counsel appearing for the appellant/A1 would contend that there is absolutely no evidence produced by the prosecution to show that the samples were kept in safe custody from the day they were produced by the seizure officer before the analyst for chemical analysis. In this regard, the evidence of P.W.19 is pertinent to be mentioned. P.W.19 in his evidence in the chief examination would depose that on 25.3.1999 at about 7.00 am P.W.17 had produced A1 along with contrabands seized from him and the samples taken from the seized contrabands for safe custody and that he had received the same and kept in his room for safe custody. It is seen from Ex.P.90 (Annexure-II) that the samples and other seized contrabands were produced before ACMM-EO-2 along with the accused for remand on 25.3.1999 at 7.00 pm. After receiving the properties, the learned ACMM EO-2 had directed P.W.19-Mr.Paul Mohamed, senior intelligence officer DRI, to produce the same before the Special judge for NDPS Act cases, Chennai on 303.1999 at 10.30 am. In obedience to the said order of the ACMM EO-2, P.W.19-Mr.Paul Mohamed, senior intelligence officer, had produced the seized contrabands before the Special Judge for NDPS Act cases, Chennai on 30.3.1999, who under Ex.P.91 had handed over the properties to P.W.3 for being produced before the Chemical Analyst for analysis. It is seen from Ex.P.37 that P.W.3-Saikumar, Intelligence Officer DRI, has received the samples of contrabands connected with this case from the Special Court for NDPS Act cases and handed over the same on 1.4.1999 before the Assistant chemical examiner, Customs

House, Chenai-1, for chemical analysis. The endorsement in Ex.P.37 by the Assistant Chemical Examiner, Chennai-1, itself will go to show that all the samples in 53 packets were received with the seal of the special Court and DRI intact and that the seals on the samples tally with the facsimile and the Court seal and DRI seal affixed in the requisition letter of the test memo. Under such circumstance, it cannot be said that sample packets were produced before the Special Court with delay and due to that there is possibility of tampering with the seal. It is pertinent to note at this juncture that not even a suggestion was put to P.W.19 that during his safe custody of 53 sample packets connected with this case, the seals were tampered with.

26(d) The learned Special Public Prosecutor relying on 1994 Crl.L.J. 1987 (Ramji Duda Makswan s. The State of Maharashtra), would contend that the appellant cannot be heard to say that there is a possibility of tampering of the seal in 53 packets before they were subjected to for chemical examination by P.W.16, since there is not even a suggestion put to P.W.19 in this regard that while 53 samples packets were kept in his custody they were being tampered with. In support of his contention, the learned Special Public Prosecutor relied on an observation of the Bombay High Court in the above cited ratio decidendi, which runs as follows:

"The short question that arises is, as to whether Mr.Barday's contention that P.I.Ghuge ought not to have retained the sample in this possession is sufficient to either cast doubt or for that matter to vitiate the present prosecution. For this purpose, we have taken note of certain special factors in this case, the first of them being the fact that P.I.Ghuge, is an Inspector of Police and Officer of sufficient Seniority and rank. In his capacity as Inspector of Police, even under Section 56 (Sic Section 55-Ed.) he would be a designated authority to whom the contraband would have been handed in normal course. It is not as though the defence has been able to establish in cross-examination that even during the short period of time of one and half days when the samples remained in his custody that he acted irresponsibly or for that matter that he tampered with it or allowed anything of that sort to happen. There is not even a suggestion along these lines."

The learned trial Judge taking into consideration all the facts and circumstances, has come to the correction conclusion that A1 is liable to be convicted under Section 8(c) r/w 21 of NDPS Act. I do not find any reason to interfere with the well considered findings of the learned trial Judge as against A1 in C.C.No.107 of 1999.

26(E) The other two appeal viz. Crl.A.No.493 & 582 of 2001 have been preferred by the State against the acquittal of A1 & A2 under Section 29 of NDPS Act and against the acquittal of A3 & A4 under Section 8(c) r/w 21, 25 & 29 of NDPS Act, respectively. In an appeal against acquittal, the only point to be considered is whether the findings of the learned trial judge is perverse in nature. The learned trial Judge has given reasoning in his judgment to the effect that there is absolutely no material placed by the prosecution before the trial Court to show when the conspiracy was hatched between A1 to A4. The admitted fact is that A1 is a Srilankan and A2 belongs to Tuticorin and A3 belongs to Rajasthan and A4 is a native of Punjab. The learned Special Public Prosecutor is not in a position to show any material to convince this Court to arrive at a conclusion that there was a conspiracy took place between A1 to A4 to commit the crime to warrant conviction under Section 29 of NDPS Act. It is the duty of the prosecution to show that there was a conspiracy hatched between the accused in order to procure, transport and export the contrabands to a foreign country, which is absent in this case. For the purpose of Section 29, the prosecution relied only on the statement given by A1 to A4 before the intelligence officer. The learned counsel appearing for A2 relying on AIR 1964 SC 1184 (Haricharan Kurmi Vs. State of Bihar), a judgment of the Full Bench of the Honourable Apex Court and contended that the statement of the accused in a criminal case cannot be taken as an evidence against co-accused. The relevant observation in the above said dictum runs as follows:

"There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession particularly if it has been retracted. With that aspect of the problem, however, we are not concerned in the present appeals. When Section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration is precisely the problem which has been raised in the present appeals. It is clear that the confession mentioned in Section 30 is not evidence under Section 3 of the Act. Section 3 defines "evidence" as meaning and including:

1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

2) all documents produced for the inspection of the Court;

Such documents are called documentary evidence. Technically construed, this definition will not apply to a confession. Part (1) of the definition refers to oral statements which the court permits or requires to be made before it; and clearly a confession made by an accused person is not such a statement; it is not made or permitted to be made before the court that tries the criminal case. Part (2) of the definitions refers to documents produced for the inspection of the Court, and a confession cannot be said to fall even under this part. Even so, Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal Court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession, because S.30 merely enables the Court to take the confession into account."

The learned trial Judge after satisfying himself that there is absolutely no evidence let in on the side of the prosecution to prove that there was a conspiracy hatched between A1 to A4 to commit this crime has rightly held that A1 to A4 are not liable to be convicted under Section 29 of the NDPS Act. When coming to the acquittal of A3 & A4 under Section 8(c) r/w 21, 25 & 29 of NDPS Act, as rightly pointed out by the learned trial Judge there was no contrabands recovered from them. It is seen from Ex.P.73-chemical analyst report, samples taken from the contrabands seized from A2 are composed of inroganic compounds and organic compounds and not Diacetyl Morphine (Heroin). There is absolutely no evidence let in this case to show that any narcotic substance was recovered from the possession of A3 & A4. Under such circumstances, I do not find any reason to interfere with the findings of the learned trial Judge as against A2 to A4 in finding that they are not guilty for the offence under Section 29 of the NDPS Act (against A1 & A2) and under Section 3(c) r/w 21, 25 & 29 of NDPS Act (against A3 & A4). Points are answered accordingly.

27. In fine, the Crl.A.No.435, 493 & 582 of 2001 are dismissed confirming the judgment in C.C.No.107 of 1999 on the file of the Additional Special Court, NDPS Act Cases, Chennai. The trial Court is directed to secure A1 by issuing NBW and to send to prison to undergo the unexpended portion of the sentence.

ssv

To

1. The Spl. Judge for NDPS Act cases cum Addl. Special Judge,
Chennai.

2. The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.14, Gopalakrishna (Iyer) Road,
T.Nagar,
Chennai 17.

3. The Special Public Prosecutor
for customs cases.

4. The Superintendent Central Prison,
Vellore (A1) in Crl.A.No.453 of 2001.

[PRV/10651]